IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO DISMISS**
v.	)	**SPECIFICATIONS 2, 3, 5, 7, 9, 10,**
	)	**11 AND 15 OF CHARGE II**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 10 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law, Rule for Courts Martial (R.C.M.) 907(a), R.C.M. 907(b)(1)(B), and the First and the Fifth Amendments to the United States Constitution, requests this Court to dismiss Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II because 18 U.S.C. Section 793(e) is unconstitutionally vague in violation of the Fifth Amendment and substantially overbroad in violation of the First Amendment. In the alternative, the Defense requests this Court to provide limiting instructions that narrow the breadth of Section 793(e) and more clearly define its vague terms.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2)(A).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010). Specifically, in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with unauthorized possession and disclosure of classified information in violation of Section 793(e). *See* Charge Sheet.

WITNESSES/EVIDENCE

4. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the following evidence in support of the Defense's motion:

a. Charge Sheet.

LEGAL AUTHORITY AND ARGUMENT

5. The Defense submits that Section 793(e) has multiple unconstitutionally vague terms that render the statute unconstitutional. Additionally, Section 793(e) is substantially overbroad in violation of the First Amendment. In the alternative, if this Court does not find that Section 793(e) is either unconstitutionally vague or substantially overbroad, this Court should provide limiting instructions that narrow the breadth of Section 793(e) and more clearly define its vague terms.

A. 18 U.S.C. Section 793(e) is Unconstitutionally Vague in Violation of the Due Process Clause

6. As a general rule, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

7. Among other requirements, the vagueness doctrine mandates that penal statutes provide fair warning of the conduct that is prohibited. *United States v. Lanier*, 520 U.S. 259, 265 (1997). The doctrine enshrines the principle "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" in three important respects. *Id.* at 265-66 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)). First, it "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its interpretation.'" *Id.* at 266 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Second, the rule of lenity "ensures fair warning" by counseling courts to interpret an ambiguous statute to proscribe only "conduct clearly covered." *Id.* Third, although limited judicial gloss is permitted to clarify some uncertainty in a statute, that gloss must not be novel or so substantial as to constitute judicial rewriting of the statute; a court "may impose a limiting construction on a statute only if it is 'reasonably susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997); *see id.* at 884-85; *Lanier*, 520 U.S. at 266.

8. Section 793(e) punishes:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic

> negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled or receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it[.]

18 U.S.C. § 793(e). The Defense submits that the phrases "relating to the national defense" and "to the injury of the United States or to the advantage of any foreign nation" are unconstitutionally vague. With these two vague phrases working in concert, Section 793(e) fails to provide the fair warning required by the Due Process Clause. Each unconstitutionally vague term is discussed in turn.

(1) The Phrase "Relating to the National Defense" is Unconstitutionally Vague

9. The phrase "relating to the national defense" is unconstitutionally vague because it gives no fair warning of what information comes within its sweeping scope. How close of a connection to national defense must the information have before it is "relating to the national defense?" Will any conceivable connection suffice? The language of Section 793(e) provides no answer, and courts have spent considerable time and effort in a vain attempt to give some content to this exceedingly vague phrase. *See United States v. Squillacote*, 221 F.3d 542, 576 (4th Cir. 2000) ("[Sections 793 and 794] unfortunately provide *no guidance* on the question of what kind of information may be considered related to or connected with the national defense. The task of defining 'national defense' information thus has been left to the courts." (emphasis added)). In the meantime, members of the public "must necessarily guess at its meaning and differ as to its interpretation.'" *Lanier*, 520 U.S. at 266 (quoting *Connally*, 269 U.S. at 391).

10. The first effort in the long line of cases interpreting this phrase was made by the United States Supreme Court in *Gorin v. United States*, 312 U.S. 19 (1941), in interpreting a predecessor statute. There, the Court held that the term "national defense" was a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id.* at 28 (internal quotations omitted). It soon became clear, however, that this definition could not be the end of the matter. After all, "[t]here are innumerable documents referring to the military or naval establishments, or related activities of national preparedness, which threaten no conceivable security or other government interest that would justify punishing one who 'communicates' such documents." Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 326 (1974). The serious First Amendment implications if the *Gorin* Court's interpretation were to be accepted for all cases could not be overlooked. Thus, the search for the ideal judicial gloss on this vague statutory term continued.

11. In *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), Judge Learned Hand attempted to provide this gloss. The court first explained the problem with the potentially all-encompassing

phrase "relating to the national defense": "It seems plain that the [phrase] cannot cover information about all those activities which become tributary to 'the national defense' in time of war; for in modern war there are none which do not." *Id.* at 815. Without providing a definitive gloss on what the phrase meant, the court settled on identifying information that was not included in that phrase, explaining that "'[i]nformation relating to the national defense,' whatever else it means, cannot . . . include" information that the Government has itself made public. *Id.* at 816.

12. Since *Heine*, courts have continued to refine the notion of when information is sufficiently public to be outside Section 793(e) and when it is sufficiently "relating to the national defense." The Fourth Circuit, for instance, has provided further judicial gloss on the phrase, requiring the information to be "closely held" by the Government and not lawfully available to the general public. *See United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988) (approving district court's instruction using this closely held language); *United States v. Dedeyan*, 584 F.2d 36, 39-40 (4th Cir. 1978) (similar).

13. This "closely held" gloss cannot in itself provide the requisite fair notice, however. Given the Government's tendency over the years to over-classify information, *see, e.g.*, Reducing Over-Classification Act, Pub. L. No. 111-258, § 2(1), 124 Stat. 2648 (2010) ("security requirements nurture over-classification and excessive compartmentation of information among agencies"), classification of information is not a talisman indicating that the information is in fact closely held by the government. Through all of this judicial gloss and classification obfuscation, the only thing that remains clear about the phrase "relating to the national defense" is this: it cannot provide the constitutionally required fair warning of what information comes within its scope.

14. Heaping one limiting construction on top of another, courts have long struggled to provide by interpretation the requisite fair warning that the phrase "relating to the national defense" cannot supply on its own. These unsuccessful efforts demonstrate that the phrase is not reasonably susceptible to a limiting construction. *See Reno*, 521 U.S. at 884. Accordingly, as the phrase "relating to the national defense" fails to provide the fair warning required under the vagueness doctrine, it is unconstitutionally vague in violation of the Fifth Amendment to the United States Constitution.

(2) <u>The Phrase "to the Injury of the United States or to the Advantage of Any Foreign Nation" is Unconstitutionally Vague</u>

15. Additionally, the phrase "to the injury of the United States or to the advantage of any foreign nation" is unconstitutionally vague because it fails to provide a defendant with fair warning of what constitutes criminal conduct. This phrase runs afoul of the vagueness doctrine in three respects: its use of the disjunctive casts a wide net on the types of information covered; courts have transplanted the phrase from a modifier of information to a modifier of the requisite mens rea; and it fails to give any indication of what type or how much of a potential injury or advantage must exist before it is triggered.

16. The phrase "to the injury of the United States or to the advantage of any foreign nation" is phrased in the disjunctive. Thus, even where the United States suffers no injury, the phrase is

still potentially implicated. Given the potential First Amendment interests that may be at stake with respect to the disclosure of information, the phrase's broad scope is problematic. "[I]f a communication does not work an injury to the United States, it would seem to follow logically that no government interest can be asserted to overcome the first amendment's guarantee of freedom of speech." Nimmer, *supra*, at 330.

17. Moreover, in their attempt to provide content to the phrase through judicial gloss, courts have impermissibly transplanted the phrase to cure vagueness concerns presented by other phrases of Section 793(e). For example, at least two courts have used the "to the injury of the United States or to the advantage of any foreign nation" phrase to shore up the shoddy mens rea of Section 793(e) by holding that a combination of evil motive, bad or underhanded purpose, and acting with the intent to injure the United States is the necessary mens rea. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 918-19 (4th Cir. 1980); *United States v. Rosen*, 445 F. Supp. 2d 602, 625-26 (E.D. Va. 2006). The problem with this transplantation is that, under the statutory text, the phrase "to the injury of the United States or to the advantage of any foreign nation" modifies the type of information – "relating to the national defense" – not the state of mind of the accused. *See* 18 U.S.C. § 793(e) ("information relating to the national defense *which information* the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" (emphasis added)). Moreover, the use of one vague term of a statute in an attempt to make a different vague term constitutionally clear is simply circular and is further evidence of Section 793(e)'s vagueness.

18. Finally, the statutory text gives no substance to the terms "injury" or "advantage." What type of injury or advantage is contemplated by Section 793(e)? What magnitude of injury or advantage is required? These questions lead to the ultimate question for vagueness purposes: How is a person supposed to know what conduct is proscribed by the statute when the statute itself leaves so many questions unanswered?

19. For these reasons, the phrase "to the injury of the United States or to the advantage of any foreign nation" is unconstitutionally vague.

(3) <u>These Two Vague Phrases Render Section 793(e) Unconstitutionally Vague</u>

20. The vague provisions mentioned above render Section 793(e) unconstitutionally vague. The precise meaning of each phrase has eluded the courts. In fact, no court has held that the plain statutory text has provided fair notice of what conduct is proscribed. Moreover, substantial judicial gloss has been unable to give clear content to these phrases. Where, as here, courts are forced to trade in the tools of statutory construction for the tools of legislative drafting in an attempt to remedy the rampant ambiguities of a criminal statute, the Due Process Clause of the Fifth Amendment has been offended.

21. The rule of lenity, one of the three manifestations of the fair warning requirement, requires that any ambiguity in a criminal statute be resolved in the accused's favor. *See Lanier*, 520 U.S. at 266. Because of the fatal ambiguities in Section 793(e), this Court should declare Section 793(e) unconstitutionally vague and dismiss Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

B. 18 U.S.C. Section 793(e) is Unconstitutionally Overbroad in Violation of the First Amendment

22. A law is substantially overbroad in violation of the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1587 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *see City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987).

23. The Defense submits that Section 793(e) is substantially overbroad in violation of the First Amendment. By its broad terms, Section 793(e) regulates a substantial amount of protected speech. Additionally, Section 793(e) infringes on the freedom of the press to investigate and publish articles on national defense topics.

24. Section 793(e) clearly regulates a wide range of speech: it prohibits any willful communication, delivery, transmission, retention (or attempt to commit any of these acts) of any information relating to the national defense, provided that the person has unauthorized possession and reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation. *See* 18 U.S.C. § 793(e). Information relating to the national defense could include speech about government programs and policies, as well as public affairs – core political speech under the First Amendment. *See Connick v. Myers*, 461 U.S. 138, 145 (1983).

25. Moreover, Section 793(e) targets disclosure or retention of only information relating to the national defense; if the information does not relate to the national defense, the speech is not regulated under Section 793(e). Thus, Section 793(e) is a content-based regulation of speech. *See Stevens*, 130 S. Ct. at 1584; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994). Such content-based regulations of speech are "presumptively invalid, and the Government bears the burden to rebut that presumption." *Stevens*, 130 S. Ct. at 1584 (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000)) (internal quotations omitted).

26. While the Government certainly has a strong interest in national security, the Government's invocation of its national security interest cannot simply vitiate bedrock First Amendment protections. As Judge Wilkinson explained in his concurrence in *Morison*:

> The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words "national security." National security is public security, not government security from informed criticism. No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented.

844 F.2d at 1081. Justice Douglas sounded similar sentiments in his concurrence in *New York Times Co. v. United States*, 403 U.S. 713 (1971), stating that "[s]ecrecy in government is

fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health." *Id.* at 724. Therefore, notwithstanding the Government's interest in national security, the First Amendment interests implicated in information relating to the national defense are substantial and must not be overlooked.

27. Additionally, Section 793(e) poses substantial dangers to the free speech rights of reporters who investigate and publish stories on national defense related topics.[1] Under the terms of Section 793(e), if a reporter had unauthorized possession of information relating to the national defense and published a story containing that information, having reason to believe that the information in the story could be used to the injury of the United States or to the advantage of any foreign nation, that reporter could be subjected to criminal prosecution. *See* 18 U.S.C. § 793(e). If Section 793(e) is upheld, the chilling effect it will have on this core speech of public concern will be dramatic.

28. For these reasons, Section 793(e) is substantially overbroad in violation of the First Amendment. Accordingly, this Court should dismiss Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

C. In the Alternative, This Court Should Provide Limiting Instructions That Narrow the Breadth of Section 793(e) and More Clearly Define its Vague Terms

29. While the Defense maintains that, for the reasons articulated above, Section 793(e) is both unconstitutionally vague and substantially overbroad, in the event that this Court finds otherwise, the Defense requests this Court to provide limiting instructions that narrow the breadth of Section 793(e) and more clearly define its vague terms. Specifically, the Defense requests that the Court provide multiple limiting instructions for the term "relating to the national defense."

30. In its definition of the term "relating to the national defense," this Court should inform the members that the Government must prove beyond a reasonable doubt that the information at issue would be potentially damaging to the United States if disclosed. *See Morison*, 844 F.2d at 1071-72 (approving a jury instruction with this language). Moreover, the potential for the damage to national security if the information is disclosed must be reasonable and direct; a strained or distant likelihood of such harm is insufficient. *See Gorin*, 312 U.S. at 31 (approving a jury instruction with this language). Finally, the type of harm that disclosure of the information is likely to cause must be endangerment to "the environment of physical security which a functioning democracy requires." *Morison*, 844 F.2d at 1082 (Wilkinson, J., concurring).

31. As this prosecution also implicates First Amendment concerns, this Court should instruct the members that the Government must prove beyond a reasonable doubt that "potentially damaging to the United States" means that a disclosure of the information would be likely to cause

[1] Though PFC Manning is not a reporter or member of the news media, he is permitted to assert their rights in an overbreadth challenge to a statute on First Amendment grounds. *See United States v. Bilby*, 39 M.J. 467, 468-69 n.2 (C.M.A. 1994) ("First Amendment overbreadth is one of the few exceptions to the principle that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982)).

imminent serious injury to the United States. *See New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring); Nimmer, *supra*, at 331-32.

32. Additionally, this Court should further instruct the members that on the "relating to the national defense" element the Government must prove beyond a reasonable doubt that the Government closely held the information and that the accused knew the information was closely held. *See Morison*, 844 F.2d at 1071-72 (approving district court's instruction using this closely held language); *Dedeyan*, 584 F.2d at 39-40 (similar); *Rosen*, 445 F.Supp.2d at 620, 625 (discussing closely held requirement and requirement of accused's knowledge that the information was closely held). To do this, the Government must prove at least two things: (1) that the information was classified and (2) that the information was not otherwise available to the public.

CONCLUSION

33. For these reasons, the Defense requests this Court to dismiss Specification 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II because Section 793(e) is unconstitutionally vague in violation of the Fifth Amendment and substantially overbroad in violation of the First Amendment. In the alternative, the Defense requests this Court to provide limiting instructions that narrow the breadth of Section 793(e) and more clearly define its vague terms.

Respectfully submitted,

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